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Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

CLEMENT JOHNSON, DARRELL)
JOHNSON and LA VON JOHNSON,)

Plaintiffs-Appellants,)

v.)

Case No. 17251

GARKANE POWER ASSOCIATION,)
INC., a Utah corporation,)

Defendant-Respondent.)

BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM THE JUDGMENT OF THE SIXTH
JUDICIAL DISTRICT COURT IN AND FOR
GARFIELD COUNTY, STATE OF UTAH
HONORABLE DON V. TIBBS, PRESIDING

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Defendant-Respondent.)

Case No. 17251

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF KIND OF CASE

This is an action instituted by plaintiffs against defendant for damages resulting from defendant's alleged failure to provide real three-phase electrical power to plaintiffs' farming operation situated at Tropic, Utah, as and when agreed.

STATEMENT OF FACTS

Plaintiffs are the owners of a farming operation situated in Tropic, Utah. Plaintiffs owned certain water rights upon which they were required to "prove up" before the spring

of 1975 or risk losing. Plaintiffs had an irrigation system engineered which included several smaller pumps, a reservoir, and as its main pressurizing device, a 100-HP electric pump motor which required "three-phase" electrical power for dependable and efficient operation.

Plaintiffs approached defendant concerning their electrical power needs in early 1974 and were advised that "real" three-phase power was not then available, but would be made available within the near future, the only evidence concerning the length of time involved at trial being within "one year

"Real" three-phase power consists of three energized legs or lines which, when connected to a balanced load such as a 100-HP three-phase electric motor, will have balanced currents. The power available in 1974 consisted of a three-line service with two energized and one neutral leg. On an interim basis it is possible to connect such a system to supply three-phase power by use of a "V-phase" or "open delta" connection from the supply to the three-phase equipment to be operated. This involves installation of a transformer between the supply and the load which induces current from that point or in the third line.

The problem with such an interim arrangement is that sizeable imbalances in the current (or amperage) exist in the load no matter how perfectly balanced the two energized lines

may be relative to the neutral, forcing the user to operate his equipment at a derated capacity or continually blow fuses. Customer loads added up and down the line and not perfectly balanced on both sides of the neutral with such an interim connection to three-phase equipment have tendency to create additional imbalance at the three-phase equipment being supplied, causing excessive amperage which aggravates the problem.

The "V-phase" or "open delta" connection is only a temporary and unreliable manner of supplying three-phase power to equipment requiring three-phase power. Inherent current imbalance and aggravation of inherent imbalance resulting from unbalanced additional customer loads on either side of the remainder of the system make such an arrangement inherently unreliable on other than a temporary basis.

Plaintiffs elected to install electric, as opposed to diesel, pumps on the basis of defendant's 1974 commitment to provide "real" three-phase power within one year, risking for that period problems which could be anticipated as a result of interim "V-phase, open delta" connected power for the first year. Lines were run and interim "open delta" or "V-phase" power was connected to plaintiffs' 100-HP motor by defendant in 1974 and was not upgraded to "real" three-phase power until early 1978. The interim power operated plaintiffs' equipment satisfactorily during 1975 and 1976, but failed to do so during

the 1977 season by reason of unbalanced loads aggravated by addition of new customers on defendant's system rendering the interim power supply ineffective for operating the primary 100-hp electric pump motor at more than 25% of its capacity without constantly blowing fuses in the unbalanced leg. Plaintiffs lost their 1977 crop, the expenses of planting, and the 1978 production which should have resulted from the 1977 planting.

The purpose of plaintiffs' action is to recover those losses and expenses resulting from defendant's breach of its claimed agreement to provide interim "V-phase" power but to upgrade plaintiffs' power supply to "real" three-phase power within one year from the date of the original installation in 1974.

DISPOSITION IN LOWER COURT

Trial was held before the Honorable Don V. Tibbs at Panguitch and Richfield, Utah, commencing April 10, 1980. At the conclusion of the trial, the District Court made Findings of Fact that:

- (1) Plaintiffs had failed to prove defendant's agreement to provide real three-phase power within any specific time frame;
- (2) Plaintiffs had failed to prove that current imbalances caused plaintiffs' loss and damage;
- (3) That there was no express and no implied contract outside the exhibits received in evidence, none of which required

defendant to supply real three-phase power.

(4) That plaintiffs had been advised by defendant that the type of power which would be available was "V-phase" power, advised of the problems they were likely to encounter, and knowingly and voluntarily undertook to accept and use that power on an indefinite basis without expectation of having real three-phase power to their property within any specific time frame

Based upon these findings, the District Court dismissed plaintiffs' complaint and awarded defendant judgment for the full amount prayed for in defendant's counterclaim for line changes and power supplied during the period in question, said judgment amounting to the sum of \$8,883.53.

ISSUES PRESENTED

1. Did the trial court err in light of the evidence and testimony adduced at trial in finding that plaintiffs had failed to prove defendant's agreement to provide real three-phase power within any specific time frame?

2. Did the trial court err in finding that plaintiffs had failed to prove that current imbalances resulting from the type of power which was supplied had caused plaintiffs' loss and damage?

3. Did the trial court err in finding that there was no express and no implied contract to provide plaintiffs with real three-phase power at all?

4. Did the trial court err in finding that plaintiffs had knowingly and voluntarily undertaken to accept and use "V-p" or "open delta connection" power to plaintiffs' 100-HP pump motor on an indefinite basis without expectation of having real three-phase power to their property within any specific time frame?

5. Was the trial court unable or unwilling to recall testimony in the record conclusively establishing a critical element of plaintiffs' case, and as a consequence, did the court make findings contrary to the only positive evidence adduced by either party on that point at trial?

6. Did the trial court grant relief favorable to the defendant neither prayed for, alleged in the pleadings nor supported by any competent evidence in the trial?

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF HAD FAILED TO PROVE DEFENDANT'S AGREEMENT TO PROVIDE REAL THREE-PHASE POWER TO PLAINTIFFS' FARMING OPERATION WITHIN A ONE-YEAR PERIOD FROM JULY - AUGUST, 1974

Testimony was adduced at trial concerning an initial conversation between plaintiff, LaVon Johnson, and defendant's representative, Darwin Jackson, during July or August of 1974 concerning the type of power which could be made available to plaintiffs' farming operation and the time frame which would be involved in getting real three-phase power to the property. With regard to the critical question of timing, plaintiff, LaVon Johnson, testified that he was told by Mr. Jackson that three-phase power was not then available, but that the power supply which was available consisted of a three-wire (two energized and one neutral) "V-phase" system which could be connected to the 100-HP three-phase electric motor by means of an "open delta" connection. Before making a decision to go with electric as opposed to diesel power, plaintiff, LaVon Johnson, inquired concerning when real three-phase power would be available in the area and was told "within a year." (T. 33, 34.)

The only written documents adduced at trial relating to three-phase power are Plaintiff's Exhibits #2 and #4.

Exhibit #2 is an undated memorandum signed by Darwin Jackson, defendant's engineer, which relates a conversation he had with Clement Johnson's son, LaVon, before plaintiffs decided upon electric as opposed to diesel power. In that memorandum, defendant's own representative described the conversation and defendant's representations concerning real three-phase power as follows:

Mr. Johnson wanted to know what GARKANE'S plans were to install three phase power into the area. It was explained that we were working on plans at that time and within a year the three phase power line would be constructed. (Emphasis added.)

He stated that they had to go with the pumps as they had planned and would have to get by until three phase was installed. (Plaintiff's Exhibit #2.)

When questioned concerning the meaning of the quoted language appearing in Exhibit #2, Mr. Darwin Jackson stated the follows:

Q. So, is it true, Mr. Jackson, that the document you hold in your hand refers to conversations with Mr. LaVon Johnson at or about the time he first contacted you concerning electrical service to their operations?

A. Yes, it refers to that. (T. 211.)

The testimony of defendant's own witness and a memorandum of the conversation prepared by defendant, which together constitute the only evidence on the question before

the trial court, conclusively establish that plaintiffs had inquired in mid-1974 concerning a specific time frame for obtaining three-phase power and had been given a commitment of "one year" from that date. The trial court quite obviously erred in making a contrary finding.

The trial court further found that there was no written contract or agreement relating to three-phase power within any specific time frame. Plaintiff's Exhibit #4, which is a document entitled "AGREEMENT FOR PURCHASE OF POWER" dated July 1, 1974 between defendant and Clement H. Johnson, provides inter alia:

1. SERVICE CHARACTERISTICS:

Service hereunder shall be alternating current, Three phase at approximately 60 cycles, 240/480 volts.

The court's finding that there was no express and no implied contract to provide real three-phase power is likewise and quite obviously contrary to the only evidence on that point adduced at trial.

POINT II

THE COURT ERRED IN FINDING THAT
PLAINTIFFS HAD FAILED TO PROVE
CURRENT IMBALANCES RESULTING FROM
THE INTERIM V-PHASE "OPEN DELTA"
CONNECTION CAUSED OR CONTRIBUTED
TO PLAINTIFFS' LOSS AND DAMAGE

During the watering year 1977, it proved impossible for plaintiffs to run the central 100-HP pump motor at more than 25% of its capacity without continually blowing fuses in one of its three "open delta" connected supply legs. The pump motor itself was carefully checked and found not to be the problem.

Q. It checked out and got a clean bill of health and there was nothing internally wrong with it?

A. That is right. (Darwin Jackson, T. 339.)

Howard Dalton, one of Garkane's employees, testified that in June of 1977 he tested the installation and found an amperage imbalance in the center leg of the V-phase "open delta" connection:

Q. Did you see anything out of the ordinary?

A. No sir. The only thing, the center leg or the grounded leg in that particular installation was fused. (Howard Dalton, T. 348.)

* * *

Q. What would you call it?

A. I would say that would be normal starting current; however, due to the fact that in a ground (open) Delta the common conductor

carries more current normally than the other two legs, then this would be excessively high and would damage the fuse and blow it. (T. 349.)

* * *

Q. So, this is something that is peculiar to an Open Delta connection; correct?

A. Yes, but it's not abnormal for an Open Delta. (T. 350.)

* * *

Q. But it accounts for blowing fuses?

A. Yes, because all three fuses were the same size. (T. 350.)

Mr. Dalton testified that after his visit to the Johnsons' property when problems with the 100-HP motor power supply developed in 1977, he told Clement Johnson:

A. [T]hat we were looking into balancing the line a little closer, amperage wise, and that it should be done but I didn't feel it was an emergency (T. 357, lines 13-16.)

Mr. Dalton further testified that during his visit to the farm and an examination of the motor, he spoke with Clement Johnson as follows:

A. He did tell me he had to run the pump a lot more this year than any other year because of his type of crop (T. 359, lines 15-17.)

Mr. Dalton testified that he advised Garkane of the imbalance he detected, and which in his mind accounted for the Johnsons' problems, and suggested that efforts be made to restore balance in the system in order to reduce or eliminate

the Johnsons' problems.

Q. Do you know what, if any, effort was undertaken by Garkane to restore balance as you had recommended?

A. No, sir. (T. 359-360.)

With respect to the cause of the imbalance he detected, Mr. Dalton testified as follows:

Q. Now, would the addition of customers, did it in anyway contribute to the unbalance that you detected?

A. Depending on how they were applied to the line, it could but not necessarily and not directly.

Q. So it would depend on how they were tapped into the "V" phase system; is that right?

A. Yes.

Q. And, if a whole bunch of customers were added and they were all on one side, that would more than likely create an unbalance than if a whole bunch were added and half were put on each side?

A. Yes, sir. (T. 360-361.)

* * *

Q. So, if an unbalance occurred and for some reason wasn't being controlled by the regulators, that would be your responsibility to attempt at least to do something about it?

A. Yes, I would be assigned to run tests and recordings on that system. (T. 361.)

When asked in his pre-trial deposition, which was referred to at the trial, whether the increased number of power users that had come on line in 1977 would be a contribut

factor to the Johnsons' problem, Mr. Dalton testified that "It definitely would." (T. 443.)

In Plaintiff's Exhibit #17, which is a statement by Mr. Dalton concerning his June 23, 1977 examination of the equipment, the power supply and his conclusions concerning the Johnsons' problem, Mr. Dalton confirms the nature of the problem which necessitated derated operation of the 100-HP pump to be the "V-phase" power involved in an "open delta" connection as opposed to real three-phase power, which was, as indicated, not at that time available, although it had been promised by defendant to be made available more than two years earlier.

Testimony and exhibits of defendant's own witnesses, as well as plaintiffs', conclusively establish that current imbalance resulting from the "open delta" connection to defendant's two or "V-phase" power supply was the only reason plaintiffs were compelled to operate the 100-HP pump at 25% of its capacity throughout the 1977 watering year as an alternative to continually blowing fuses in the unbalanced leg. The trial court erred in making a contrary finding in the face of such direct, compelling and uncontroverted evidence.

POINT III

THE TRIAL COURT FORGOT OR DISREGARDED DIRECT TESTIMONY CONSTITUTING THE ONLY EVIDENCE ON THE CRITICAL POINT WHETHER THERE WAS AN AGREEMENT OR COMMITMENT ON THE PART OF DEFENDANT TO SUPPLY REAL THREE-PHASE POWER WITHIN ANY DEFINITE TIME FRAME BEFORE PLAINTIFFS ELECTED TO USE ELECTRIC POWER IN 1974

Toward the conclusion of trial and during the examination of plaintiffs' electrical engineering expert, Mr. Ronald Lenk, the following exchange took place between the court and counsel:

MR. THURBER: Well, the evidence is that real three phase power was promised within a year of '74.

THE COURT: I don't remember that evidence, Counsel. The evidence (sic objection) is sustained on the grounds of relevancy. I know that's your theory.

MR. THURBER: No, that's the testimony.

THE COURT: Well, I can remember what the testimony was and that's my job and the objection's sustained. (T. 661.)

It is obvious that the court disregarded or forgot the testimony of Darwin Jackson relating to Plaintiff's Exhibit #2 set forth above, and in addition the testimony of plaintiff, LaVon Johnson, those two individuals being the only parties to the critical 1974 conversation. The testimony of neither on this point was controverted throughout the trial

On this subject matter LaVon Johnson's testimony was as follows:

- Q. Alright. Tell us what was said about it during that conversation?
- A. That we would be -- that it would be risky for us to try to use the hundred horse power motor under the existing conditions.
- Q. Did he explain why?
- A. That there wasn't three phase power, that the three phase power wouldn't be there by the next spring, when we had to start pumping.
- Q. You mean the spring of '75?
- A. Yes.
- Q. What else was said about the hundred horse power?
- A. And I asked him, and this took place over a period of time, and then some time ago he did, at some point in those conferences tell me and subsequently did so in writing with a contract, within a year's time, after we started, that Garkane would furnish us with three phase power. I don't know whether that's clear or not. (T. 32, line 17.)

* * *

- Q. You said there were a number of conferences over a certain period of time between yourself and Mr. Jackson?
- A. Yes.
- Q. What period of time was covered?
- A. This went on into the fall of 1974 and when we had all the information that I had been assigned to get together relating

to our potential liason with Garkane, then we decided based on that information this was the next thing, there would be "V" phase power at the ranch and within a year there would be three phase power and we agreed that we would pay the horse power charges as outlined in the documents which were sent to us by mail. We decided to go electric all the way and not to diesel.

- Q. Was that decision made in reliance upon Garkane's promise to you from Mr. Jackson to have three phase power to the ranch within a year
- A. Yes, and realizing from both Mr. Jackson's words and Mr. Snyder that during the first year we knew that we might have problems with the electric set up but we really had no choice but to go forward or lose the water; but, of course, we know that the only thing you have in land is that it's valueless without the water.

* * *

- Q. In any event you did elect to go electricity as opposed to diesel.
- A. Yes. There was another factor which entered into our decision and this was or would have been the first year for the most of the land to ever have been cropped. We didn't expect a big yield the first year from any land and so we thought, 'Well, even if we do have some problems, we will still prove the water up,' as this was our major objective at that time and so then figured the second year we would definitely be in good shape with three phase power, and we elected to take whatever risk there might have been the first year with "V" phase power.
- Q. And had real three phase power not been promised you within that one year period, would your election have been electricity?
- A. No. (T. 33, line 26 - T. 34, line 11.)
(Note there are two page 34's.)

The court's findings that plaintiffs had failed to prove an agreement on the part of defendant to provide three-phase power within a specific time frame, and that plaintiffs had elected to "take their chances" by using the available V-phase "open delta" arrangement indefinitely is directly contrary to the only evidence at trial relating to those matters. The trial court erred in making the findings it did in view of the only evidence before it.

POINT IV

THERE WAS NO EVIDENCE ADDUCED AT TRIAL SUPPORTING THE TRIAL COURT'S JUDGMENT AWARDING DEFENDANT A COUNTERCLAIM AGAINST PLAINTIFFS

Absolutely no evidence was presented by the defendant at trial either by way of testimony or exhibits with corroborating testimony tending to support defendant's counterclaim of \$8,883.53. The record is entirely devoid of any evidence supporting the trial court's Findings of Fact No. 10.

CONCLUSION

For any or all of the foregoing reasons, the judgment of the trial court is clearly contrary to the evidence adduced at trial, and should be reversed.

Dated this 11th day of March, 1981.

Respectfully submitted,



ANTHONY M. THURBER
Attorney for Plaintiffs-
Appellants

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Plaintiffs-Appellants were served upon D. Gary Christian, Kipp & Christian, 600 Commercial Club Building, Salt Lake City, Utah 84111 by personal service this 12th day of March, 1981.


